

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

SPECIAL CIVIL APPLICATION No 14 of 1995

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the Judgment ?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BHAGUBHAI M PATEL
VERSUS
STATE OF GUJARAT

Appearance:

MS SANGITA PAHWA for the Petitioner
MR HH PATEL for the Respondents

CORAM : MR JUSTICE S.K. KESHOTE
Date of Decision : 16/09/1999

C.A.V. JUDGMENT

1. By this petition under Article 226 of the Constitution, the petitioner a Senior Clerk of the District Panchayat, Mahesana is praying for quashing and

setting aside the action of the respondents not to consider him eligible for promotion to the post of Taluka Development Officer as being illegal and arbitrary and violative of Article 14 of the Constitution. Another prayer has been made for declaring Rule 2 of the Taluka Development Officer (Gujarat Development Services Class II) Recruitment Rules, 1990 as amended by the Taluka Development Officer (Gujarat Development Services Class II) Recruitment (Amendment) Rules, 1992 as illegal and arbitrary and violative of Article 14 of the Constitution of India. Some other consequential reliefs have also been prayed for.

2. The facts of the case, in brief, are that the petitioner was appointed on the post of Junior Clerk in 1970 in the Office of the District Panchayat, Mahesana. In 1985, he was promoted to the post of Sr. Clerk (Sr. Karkoon). The hierarchy, what the petitioner stated in the office of the respondent, is Junior Clerk, Senior Clerk, Aval Karkoon and T.D.O.. As per the Recruitment Rules, 1979, the petitioner was eligible to be considered for promotion to the post of T.D.O after he passed the required departmental examination under the aforesaid rules. The petitioner passed the lower grade examination in the year 1988. He appeared for higher grade examination but he was declared passed only in one paper. It is the case of the petitioner that he was exempted to appear in the papers in which he passed in this examination.

3. Vide notification dated 27-9-1990, the Taluka Development Officer, (Gujarat Development Services Class II) Recruitment Rules, 1990 were published and brought into force. It is the grievance of the petitioner that in the Rules, the promotion which was earlier available to the post of Taluka Development Officer from the cadre of Sr. Clerk (Sr. Karkoon) has been taken out. Rules, 1990, the petitioner submits, were amended vide notification dated 7th February, 1992 and further proviso is added to Rule 2 in Clause (a) after the second proviso. Under this proviso, the persons who were eligible for promotion to the post of T.D.O. Gujarat Development Services Class II under the superseded Rules and who had passed the departmental examination prescribed for the purpose before 27th September, 1990 were made eligible for being considered for promotion to the post of T.D.O., Gujarat Development Services, Class II under the Rules, 1990 subject to other conditions as specified.

4. The petitioner challenges both Rules, 1990 as well as the proviso to Rule 2 in clause (a) after the second proviso, as added by the notification dated 7th February, 1992.

5. The learned counsel for the petitioner contended that the vested accrued right of promotion of the petitioner could not have been taken away by framing new rules. It has next been contended that under the proviso which is added by notification dated 7th February, 1992, provision should have been there to make those persons also eligible who have passed some of the papers of the qualifying examination for promotion to the post of T.D.O. Rule 2 of Rules, 1990 has been challenged on the ground that it has not taken care of those persons who had already started giving the departmental examination under the superseded Rules and who have already passed one or more papers of the said examination.

6. Counsel for the respondents submitted that the Rules are perfectly legal and justified and does not suffer from any vice of unconstitutionality. Under Article 309 of the Constitution, legislative powers are conferred upon his Excellency, the Governor of the State and the Rules can be framed under which some of the class of persons may be deprived of the promotion. Validity of the Rule cannot be challenged on the ground on which it is challenged by the petitioner. So far as the proviso is concerned, it is submitted that the Rule making authority has taken care of those persons who have already passed the qualifying examination as prescribed under the superseded Rules for promotion to the post of T.D.O.. It was a reasonable approach and accordingly the Rule has been amended. The petitioner cannot take the benefit of the same as he has not passed the qualifying examination prescribed for promotion to the post of T.D.O. before 27th September, 1990.

7. Having heard the learned counsel for the parties and giving thoughtful consideration to the rival contentions made by them, I am of the opinion that this petition is wholly misconceived.

8. Promotion is one of the modes of recruitment and it is not the service condition. Rule making authority may provide promotion to a person from a feeder cadre but unilaterally this can be taken subsequently, as it does not become a service condition or more so irrevocable service condition. Promotion cannot be claimed as of right also. Promotion can be claimed only

in case it is provided by the Rules framed under Article 309 of the Constitution or otherwise under the executive orders. It is true that in earlier Rules, 1979, the channel of promotion to the post of T.D.O. was provided from the feeder post of Sr. Clerk / Sr. Karkoon but in later point of time this could have been amended, which has been amended and it cannot be said to be a case of any accrued right of promotion of the petitioner. Rules of 1990 are prospective in effect and all the promotions to the post of T.D.O. before 27th September, 1990 are to be regulated under the superseded Rules. The petitioner as he has passed only one of the papers of the qualifying examination prescribed for promotion to the post of T.D.O. before 27th September, 1990 could not get promotion under the superseded Rules. Under the superseded Rules, learned counsel for the petitioner is unable to show any provision which makes a person who has not passed one or two papers of higher qualifying examination eligible for promotion to the post of T.D.O. Under the superseded Rules, only Sr. Clerk/ Sr. Karkoon who has passed both the lower and higher grade examination is eligible for promotion. It is too far contention of the petitioner and if it is accepted then though otherwise the petitioner was not eligible for promotion he will be taken to be eligible for promotion. Such a legal fiction cannot be given under the Rules framed under Article 309 of the Constitution. By amendment of Rules, 1990 in the year 1992, those Sr. Clerks who had passed both the qualifying examinations on 27th September, 1990 were made eligible for promotion. This has been given as concession otherwise those class of persons also could not have claimed it to be as of right. The cut off date could have been there and henceforth, the Sr. Clerks may not be eligible though they would have passed both the qualifying examinations or attained the eligibility for promotion under the superseded Rules but a sympathetic view has been taken and those class of persons have been protected but it cannot be said to be a case of discrimination. The persons who passed both the qualifying examinations before 27th September, 1990 and persons who have not passed those qualifying examinations cannot be placed in one class. These are two separate classes and in case the former persons were protected it cannot be said to be a case of discrimination. Plea of discrimination is available only when both the persons are of same category.

9. Taking into consideration the totality of the facts of this case, I do not find anything wrong in the Rules, 1990 as well as the proviso as added to the

Rules, 1990 by amendment of the Rules vide notification dated 7th February, 1992. Both the Rules are perfectly legal and justified and the same are not ultra-vires of any of the Articles of the Constitution.

10. In the result, this special civil application fails and the same is dismissed. Rule discharged. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

zgs/-